No. 13085

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD M. COURTNEY,

Appellant

vs.

CUSTER COUNTY BANK, A Corporation and OLIVER T. DAVIS,

Appellees.

Brief of Appellant

Appeal from the United States District Court for the District of Idaho, Eastern Division

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GATEWAY PRINTERS — POCATELLO

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JURISDICTIONAL FACTS.

This is an action brought by appellant, plaintiff below, Howard M. Courtney, a resident of the State of California, against the Custer County Bank, an Idaho Banking corporation and Oliver T. Davis, a resident of Idaho, to recover the sum of $10,000.

STATEMENT OF FACTS

In November, 1946, an Idaho mining corporation known as the Fourth of July Mining Company mortgaged certain mining equipment to the Custer County Bank of Challis, Idaho for the sum of $7,500.00. The bank subsequently ascertained that some of the property mortgaged to it by

the mining corporation did not belong to the mining corporation, and further, considering the loan a poor one, proceeded to demand payment from the Company.

The Mining Company sought another source for funds, and succeeded in interesting Mr. Courtney in advancing $10,000, after he had inspected the mining company property equipment.

Mr. Courtney went to Challis, Idaho, September 23, 1947, and with officials of the Mining Company went to the bank to transact the loan.

At that time the Mining Company was indebted on two loans, one to the bank secured by the mortgage on which there was property listed not belonging to the Mining company, and one to Roy E. Bassett secured by mortgage on a GMC truck and a portable welder, the loan being for $1,000.

The bank, through its cashier, Oliver T. Davis, was engaged to prepare necessary papers and act as escrow holder of the $10,000 to be paid by Courtney, and to act as his agent for the collection of payments on the new loan.

Mr. Courtney advised Mr. Davis, cashier of the bank, that before delivering the $10,000, that Mr. Davis was to obtain a mortgage in favor of Courtney covering "all of the property on the bank's mortgage, and the property on the Bassett mortgage," and to ascertain that all such property was free of liens.

Mr. Davis, according to Courtney, agreed to do this. At that time, however, Mr. Davis knew that he could not pre-

pare a mortgage from the Mining Company to Courtney covering the same property as the bank held on its mortgage, for the very reason that the bank had ascertained the mining company did not own all the property listed on the mortgage to the bank. The property on the bank's mortgage not owned by the mining company was as follows: Large and small ore crushers, ball mill, 40 hp. engine, flotation machine, 150 hp. diesel motor.

Mr. Davis did not disclose this to Mr. Courtney, but remained silent. Furthermore, he did not advise Courtney that the bank could not carry out such instructions.

Mr. Courtney turned over the $10,000 to the bank and shortly thereafter left.

The mortgage was prepared, executed by the mining company, and thereupon the $10,000 disbursed by the bank. The mortgage was not prepared according to Courtney's instructions. The property listed above and the welder and GMC truck were omitted therefrom.

Courtney did not learn of the omission until August, 1948. In the meantime, the note had come due, and in consideration of the issuance of some stock, the note was extended. The stock so issued was delivered to Mr. Courtney the same day he discovered from a copy of the mortgage given him by the bank, that the instructions he had given had not been followed.

This suit is the action by Mr. Courtney to recover the $10,000 from the bank by reason of the fraud perpetrated

upon him by the bank and its officer, the cashier Oliver T. Davis.

At the trial of the case, Mr. Courtney was asked concerning the value of the equipment left off his mortgage by the bank; the trial court refused to permit him to testify.

The president of the corporation was then called to testify as to the value of the property omitted from the mortgage; the trial court sustained objections to this line of testimony.

The trial court then directed the jury to return a verdict for plaintiff upon the grounds that the plaintiff had received stock for an extension of the mortgage, on or about the date he was furnished copy of the mortgage, indicating an acceptance of the mortgage; further, that plaintiff had not exhausted his security; further that there was no evidence of fraud on the part of the bank; and further that there was no evidence to enable a jury to determine damages.

The appeal is from that ruling of the trial court, as well as the rulings of the trial court with respect to admission of testimony of Mr. Courtney and Mr. Haygood as to the value of the property on the mortgage, and the property omitted from the mortgage.

HISTORY OF THE CASE

The original complaint in this action was filed January 13, 1950. Motion for Bill of Particulars and for More Definite Statement were filed February 25, 1950, by the defendants, and the court granted such Motions June 14, 1950.

Amended complaint was filed July 19, 1950, to which defendants filed a Motion to Dismiss and Motion to Strike. The court overruled the Motions without prejudice March 13, 1951, and defendants filed their answer to the amended complaint April 10, 1951. The case was tried May 16, May 17, 1951, and the court directed Judgment for Defendant.

SUMMARY OF PLEADINGS

Appellant's complaint recites the residence of the parties the existence of the defendant banking corporation; it pleads the making of a mortgage by the Fourth of July Mining Company to the defendant bank reciting the property mortgaged; it alleges the discovery by the bank of the fact certain property on the mortgage did not belong to the mortgagor, the withholding of that information by the defendants from plaintiff; the arrangements for plaintiff to make a loan to the Mining Company, and employment of the bank to handle the transaction and the directions given the bank, the acceptance of such instructions by the bank, knowing it could not comply thereto, the action of the bank and the banks violation's of the instructions.

It recites the damages by reason of the bank's fraud and disregard of instructions, and seeks restitution of the $10,000 advanced by plaintiff. Attorney fees and punitive damages are also sought.

Appellees, in their answer to the amended complaint deny the existence of a cause action; as a second defense deny the existence of instructions to it by plaintiff, and deny fraud and

damages. As an affirmative defense the defendants plead laches; as a second affirmative defense, estoppel is plead; as a third affirmative defense, negligence is plead and a fourth affirmative defense repeats the first three. And defendants sought dismissal of the action.

QUESTIONS INVOLVED

The questions involved are:

1. The right of witnesses of plaintiff in this case to testify as to the value of the property omitted from the mortgage prepared by the defendant bank.

2. The nature of damage plaintiff had to prove in an action seeking restitution of money ($10,000) paid over by reason of fraud of the defendants.

3. Whether the action of the defendants in omitting certain property from a mortgage which they had agreed to prepare for the plaintiff, constituted fraud.

4. Whether the omission of the defendants, acting in a fiduciary relationship on behalf of plaintiff, in not advising him of certain facts relating to the transaction, was a fraud of omission. That is, was the bank under any duty to disclose to plaintiff that some of the property on the mortgage of the minoing company held by the bank did not belong to the mining company held by the bank did not belong to mortgage being made by the mining company to the plaintiff, which new mortgage was being prepared by the bank at the instance of plaintiff.

SPECIFICATIONS OF ERROR

The trial court erred in holding that there was no evidence of fraud.

The trial court erred in holding that there was no evidence of damage, inasmuch as plaintiff was seeking restitution of his $10,000.

The trial court erred in sustaining objections to the testimony of witness Howard Courtney as to the value of the property omitted from his mortgage.

The trial court erred in sustaining objections to the testimony of witness Haygood as to the value of the property on the mortgage, and omitted from mortgage.

Trial court erred in directing verdict for defendant.

SUMMARY OF ARGUMENT

Plaintiff, in bringing this action for fraud, had a choice of affirming the contract or agreement between himself and the bank, and seeking compensatory damages, or seeking rescission of his contract with the bank upon the grounds of fraud and return of his $10,000 upon an obligation implied by law to return the same because of the fraud of the bank.

> American Jurisprudence on Fraud,
> Volume 24, pages 8-9 et seq. Section 190 et seq.
> Section 202, at page 25.

In proving value of the property left off his mortgage, as well as value of the items thereon, plaintiff called as a

witness the President of the Fourth of July Mining Company, the corporation owning the property. The trial court sustained objections to this testimony. This was errer for the reason a corporation officer who is shown to be familiar with the facts may testify on behalf of the corporation as to value of corporation property.

Weber v. West Seattle Land & Improvement Co.,
63 P. 2d 418 (Washington);

Travelers Indemnity Company v. Plymouth Box Panel Company,
(Circ. Ct. of Appeals, 4th Circ.) 9 Fed. 218;

Appeal of Dubuque-Wisconsin Bridge Co.
(Iowa) 25 NW 2d 327;

Dallas Railway & Terminal Co. v. Strickland Transportation Co.
(Texas) 225 S. W. 2d 901;

Hellstrom v. First Guaranty Bank,
(N.D.) 209 NW 212, 45 ALR 1487;

See also ALR notes:
5 ALR 1171, 11 ALR 1494-5.

Failure of a person acting in a fiduciary or confidential relationship to another to disclose knowledge of financial situation of a party is fraudulent conduct.

Bardach v. Chain Bakers, Inc., et al.
37 N. Y. Supp. 2d 584, affirmed
50 N.E. 2d 233;

Fox v. Cosgriff,
64 Idaho 448, 133 P. 2d 930.

Plaintiff fulfilled the elements of an action for fraud.

Kemmerer v. Pollard,
15 Idaho 34, 96 P. 206.

The facts proven by plaintiff established a fiduciary relationship, as defined by law.

See Section 2 (b), p. 7, Restatement of Trusts;
Section 874, p. 432, Restatement of Torts;
Words & Phrases, Volume 16, p. 513-522.

ARGUMENT

To begin with, what is the nature of plaintiff's action? It is a well established principal that a party bringing an action for fraud has a choice of remedies. The law in this respect is well summarized, supported by annotated cases, in Volume 24, American Jurisprudence, pages 8-9 et seq., Section 190 et seq. There it is said:

> "When knowledge of the fact that fraud has been committed in procuring a contract is brought home to him, the party to it thereby aggrieved is put upon his election and the legal system offers him a choice of several courses of conduct and remedies to redress the effect of the fraud and false representations. He may elect to affirm the transaction and sue for the benefits to which he is entitled thereunder, or for damages for deceit. On the other hand, he may elect

to disaffirm the contract, frequently doing so by electing to rescind and be restored to his former position, recovering money paid out, or recapturing property, and in very many cases invoking the aid of a court of equity for the purpose of obtaining rescission and further relief, ... "

"It is well settled that the various course of conduct and remedies for the redress of fraud may be, and usually are, alternative and mutually inconsistent. Although a defrauded person may have the initial choice of courses of action and legal remedies of affirmance or disaffirmance, he must select his course of conduct. This course once chosen and acted upon in a manner deemed by the rules of law and equity to constitute an effectual choice or election and not a fruitless attempt at recourse to an unavailable remedy, is final and conclusive. The victim of the fraud cannot both affirm and disaffirm. Selection of one course of conduct is often held to constitute a waiver of the right to assert the other, or to give rise to an estoppel against its predication. In its essence, this doctrine is a broad application of the specific principal of election of remedies that a defrauded person may either affirm the contract and recover or disaffirm and rescind it, but cannot pursue to a final conclusion both remedies."

Applying these principles to the instant action, let us review the situation. When plaintiff discovered his mortgage did not include the property he had asked be included thereon, what did he do? Did he affirm the action taken by foreclosing the mortgage as made, obtaining a deficiency and then suing for are damages he had suffered by reason of the bank's fraud? No, he proceeded at once against the bank, by such action

rescinding the agreement with them, and sought recovery of his $10,000 loan. As plaintiff put it, he is out $10,000, some one has it and he wants it back; he is not seeking damages for the fraud, but return of his money. The fraud is grounds for obtaining its return by rescission of the agreement whereby it was paid over to the bank. The object of the instant lawsuit is to obtain return of the $10,000, not to seek some undertermined amount of damages, for example the difference between the value of the property actually mortgaged and what should have been mortgaged.

In directing verdict for defendant, the trial judge noted that plaintiff had not foreclosed. We urged that if plaintiff had foreclosed and then sought his damages, that such action would have been an irrevocable election on his part to affirm the contract and sue for damages by reason of the fraud of the defendants. His action would then have been in tort, and truly enough, the jury would have had no evidence upon which to determine plaintiff's damages.

As to the nature of the instant action, we again refer to American Jurisprudence, Volume 24, p. 25, section 202, from which it clearly appears.

> "One of the frequently employed remedies at law for the redress of fraud is assumpsit or the code equivalent thereof, and as a general rule, one who has been fraudulently induced to part with money or personal property may waive the tort and sue in assumpsit as on an implied contract. Thus a defrauded party who in accordance with the law has rescinded a contract may come into a court of law for all the relief which such

> court is competent to give him and in instance where he merely asks for a return of the consideration parted with by reason of the fraud he is entitled to maintain the action of assumpsit. If money alone has been transferred by the rescinding party upon the rescission the law implies a promise to return it which becomes a basis for a common-law action of money had and received. A cause of action on an implied assumpsit to recover back money paid on account of a contract rescinded as having been procured by fraudulent representations sounds in contract rather than in tort."

Naturally to maintain such an action, plaintiff must first, as he has done here, plead and prove the elements of fraud so that upon the proof of fraud, the obligation to return the money so obtained by defendants can be implied. And in his proof of fraud, plaintiff must show pecuniary damages entitling him to rescind the contract. The plaintiff below sought to prove all the elements of fraud in support of his action to recover the $10,000.

The essential elements of a cause of action for fraud are established by the Idaho case of Kemmerer v. Pollard, 15 Idaho 34, 96 P. 206. It holds, (page 38 of the Idaho reports)

> "The law is well set led hat where a party seeks to recover on the grounds of deceit and false and fraudulent representations that he must plead the particular representations made and that they were false and fraudulent and material and that the party injured believed and relied in such statements and acted upon the belief and with the understandings that such false and fraudulent representations were

true. He must also show in which instances they were untrue."

The Idaho courts have further held that failure to disclose facts may be fraud. See Fox v. Cosgriff, 64 Idaho 448, 133 P. 2d 930. In this case, the court held a complaint to state a cause of action which charged the following:

> "the said plaintiff personally, and by and through his agents did specifically inquire of the defendants and each of them, . . . and notwithstanding said specific inquiry, the defendants did wrongfully, unlawfully and fraudulently fail, refuse, and neglect to disclose fully or at all to the plaintiff the facts concerning the condition of the business assets or affairs of the said Hailey National Bank . . . . . and did wrongfully, unlawfully and fraudulently conceal from the said plaintiff the condition of the business, assets and affairs of and the actual intrinsic value of the capital stock of the Hailey National Bank, and did fail, refuse and neglect to diclose fully or at all, and did wrongfully, unlawfully and fraudulently conceal from the plaintiff the facts of the same and negotiations for the sale of the assets of the Hailey National Bank to the First Security Corporation of Idaho . . ."

We shall try to show that plaintiff's proof at the time of the directed verdict, met the above requirements. Simply stated, his proof showed: That the bank had a mortgage which had gone "sour," and wanted to get out from under it, having discovered there was property on their mortgage which did not belong to the mortgagor, Fourth of July Mining Company; that the mining company interested Mr.

Courtney in making a loan to it, Mr. Courtney having first familiarized himself with the mining equipment, and with the mortgage held by the bank; that Mr. Courtney knew that a part of the loan he was making would be used to pay off the bank loan, and some of it to pay off a loan secured by a mortgage on a truck and welder; that Mr. Courtney engaged the bank to look after his interest in the preparation and filing of the mortgage, lien search, and to make the collections due under the new note and mortgage, signing an escrow agreement; that among the directions given the bank by Courtney was one directing them to be positive to include upon his mortgage the same property they had upon their mortgage, (advising them as to one piece of property in particular, a large motor), as well as the truck and welder (Transcript pages 70-71, 76, 77, 84, 86, 87, 89, 91).

The record clearly shows the bank knew some of the property on the mortgage held by it, could not be included on the new mortgage for the reason that the bank had been informed and knew that the particular items did not belong to the Fourth of July Mining Company. Though acting in a fiduciary relationship with plaintiff, the bank did not divulge this information to plaintiff (Transcript, p. 53-54, 59), and Mr. Courtney testified that if he had been given this information he would not have made the loan (Transcript, p. 99). The record further shows Courtney did pay over to the bank $10,000, and that he did not receive a mortgage covering all the property he had directed the bank to include thereon: that the following items were omitted:

GMC truck, welder, the ball mill, the flotation machine, two rock crushers, 150 horse power diesel with direct driven generator.

It is shown that the bank prepared the mortgage and disbursed the $10,000 turned over to them by plaintiff, contrary to his insturctions, and while acting in a confidential or fiduciary relationship.

At the trial of this cause the trial judge sustained all objections to offers of evidence of the value of the equipment of the Mining Company involved in the mortgages in question, both that on the mortgage and that ommitted from the mortgage. We urge that this was error.

The qualifications of the witness Courtney were established, but the court refused him the right to testify.

Even greater error was the rejection of the testimony of the witness Haygood. He had testified he was President of the company, that he was familiar with the property of the company. Nonetheless the objection to his testimony was sustained.

The authorities are well established to the effect that an officer of a corporation who has testified he is familiar with the operations of the company and the value of its property may testify, the weight of his testimony being for the jury.

In Weber v. West Seattle Land & Improvement Company, 63 P. 2d, 418 (Washington), at page 421, it is said:

"It is settled law in this state that the owner of pro-

perty may testify as to its value upon the assumption or presumption that he is so far familiar with the property and its uses as to know its worth (citing case).

"If this be the rule as to one private owner, it must likewise be the rule as to all private owners. A corporation can give testimony only through an officer or agent, and if an individual owner may testify, then the one particular individual who controls and manages the corporation must of necessity be permitted to testify in order that the rule may be general and uniform in its application. In spite of some authority from other states which seem to look in the other direction, we think that equality and uniformity require that respondent's testimony was admissible.

"Appellant itself took advantage of the same rule and its managing officer who never did own the property gave his opinion as to the value."

In Travelers Indemnity Company v. Plymouth Box & Panel Company (Circuit Court of Appeals, 4th Circ.) 9 Fed. 2d 218, at page 223, it was held:

"Appellant particularly alleges error in the admission of the testimony of plaintiff's witness. Still, as to the sound value of the machine before the accident on the ground that he was not qualified to express an opinion; but it appears from the record that he was the president of the insured and had been familiar with the particular machine in operation for several years. As the owner's representative he was therefore entitled to express an opinion as to value the weight of which was wholly for the jury. (Wigmore on Evidence(2d. Ed. Vol. 1, Sec. 716; Barrett v.

Fournial (2d Circ.) 21 F. 2d 298; Chicago and E. R. Co. v. Ohio City Lumber Company, 6 Circ. 214 F. 751; Union Pacific R. Co. v. Lucus, 8 Circ. 136 F. 374."

Other authorities and collection and review of authorities on the same point:

Appeal of Dubuque-Wisconsin Bridge Co. (Iowa) 25 NW 2d 327;

Dallas Railway & Terminal Co. v. Strickland Transportation Co., (Texas) 225 S. W. 2d 901;

Note, 5 A.L.R. 1171;

Note, 11 A.L.R. 1494-5;

Hellstrom v. First Guaranty Bank (N.D.) 209 N.W. 212; 45 A.L.R. 1487.

As to the testimony of Mr. Courtney himself: he testified he had seen the machinery, that he had dealt in machinery similar to that in question, and that he was familiar with the value of such equipment. Nonetheless the court barred his testimony.

It must be remembered that the mining machinery in question was situate on a mountainside about 60 miles from Challis, a little community of 600. It was more or less generally inaccessible, and it is not at all likely that any person, or persons, qualified as experts could testify as to the value

of that machinery at the time of the making of the mortgage. The rule laid down by the trial judge as to value is undoubtedly correct, but he inferred in his ruling that it was unlikely that any one would be able to meet the requirement and testify as to this particular machinery, unless it were a mining equipment salesman, brought to the area for that purpose, at the very time the mortgage was being made, for the purpose of fixing a value of the equipment at that time, at that location, in that precise condition. We submit it would have been impossible to anticipate this lawsuit and arranged for such a witness, and that it was an abuse of discretion not to permit Courtney to testify. A foundation was laid showing his familiarity with this type of equipment; that he had inspected it at the point where it was earlier in the year, and was familiar with it.

The trial court, in directing verdict for the defendant, ruled there was no evidence of fraud.

The purpose of this evidence was to prove one of the elements of fraud, to-wit, pecuniary damages to plaintiff, against the defendants, justifying rescission and restitution by reason of fraud of the other party though as we have noted before, plaintiff was not seeking damages for the difference between the equipment to have been included and that actually included on the mortgage. Plaintiff was seeking restitution of his $10,000, and evidence of the value of the property omitted was to show a material misrepresentation or omission.

Even though evidence as to actual value was rejected

by the trial court, we urge that the trial court erred in ruling there was no evidence of damage. Since plaintiff sought restitution of the $10,000 paid out, and not the difference between the value of the property supposed to have been on the mortgage and that actually included, he would not have to prove exact values.

Items left off the mortgage, which Mr. Courtney had insisted should be included, were fully described and itemized to the jury. It would be a simple matter for the jury to draw from their own experience and background as to the materiality and substantiality of the items omitted, and determine whether Mr. Courtney was damaged and defrauded by the omission of such items. Jurors should have been permitted to use their own knowledge in determining if the plaintiff had been defrauded of value by such omission;

See Jones On Evidence, Vol. 1 p. 234 3d Ed.

Determination of this case did not require a determination of the exact value of the omitted items, but simply if they were of such value that their omission constituted a fraud upon the plaintiff. The fact that a GMC truck and a portable welder, previously mortgaged for $1,000, had been omitted from plaintiff's mortgage, would in and of itself establish that plaintiff had suffered pecuniary loss and been deprived of something of value by the fraud of the defendants. The jurors did not need to have submitted to them the precise or exact value of such items. It would be presumed that such property had some kind of value, and since it was not

on the mortgage, then the plaintiff had been the victim of fraud.

As we have urged and pointed out before, when the trial court stated in directing his verdict there was no measure of damages, he totally ignored plaintiff's theory of the case—plaintiff's right to restitution of the $10,000.

The trial court, instead, seemed to go upon the theory that plaintiff had to foreclose, ascertain his loss, and sue for the difference. Such is not the case when plaintiff who has been defrauded, seeks restitution.

In seeking restitution, when plaintiff proves fraud and some pecuniary damage, he recovers not the pecuniary damages but the money or property initially expended or delivered by him.

There was ample evidence before the jury to determine that there had been damage to plaintiff by the omission of the property from his mortgage, and if such was the case, that by reason of the fraud, plaintiff was entitled to restitution of his $10,000.

On the basis of foregoing argument we urge the trial court erred in ruling there was no evidence of damage to plaintiff, and that the trial court erred in asserting plaintiff was required to "exhaust his security" first before maintaining this action.

We next urge that the trial court, in directing its verdict erred in ruling there was no evidence of fraud.

At the time the court directed verdict for the defendant, plaintiff had adduced evidence, which if believed, established:

1. That the plaintiff employed and relied upon the defendants to handle the making of a mortgage between him and the Mining Company.

2. That the defendants accepted such employment.

3. That the plaintiff gave defendants certain instructions to be followed with regard to the preparation of the mortgage.

4. That the defendants, upon hearing the instructions, knew they could not comply with such instructions in several particulars; but that the defendants did not advise the plaintiff of that fact.

5. That they accepted the employment, representing they could do so, when in fact they could not comply with the terms prescribed by plaintiff.

6. That the defendants failed to perform according to instructions, omitting the welder and truck from the new mortgage, as well as the property on their mortgage which they had learned did not belong to the Mining Company.

7. That the plaintiff delivered to the defendants $10,000 to be disbursed according to his terms and instructions; the defendants accepted this money knowing they could not comply with his terms, and did disburse it contrary to his instructions, and that part of the money was used to pay off their own "bad" loan.

Plaintiff's evidence established these facts; though defendant denied this in his pleadings and would have undoubtedly attempted to sustain such denial with proof, nonetheless, we urge that this evience created an issue of fact for the jury as to fraud, and that the court erred in taking away this issue from the jury and arbitrarily ruling and directing a verdict for defendants.

Whether the jury would accept plaintiff's version or defendant's version of the transaction relating to the preparation of the mortgage was for their determination, not for the court.

Plaintiff's evidence clearly established that the defendants, while acting in a confidential, or fiduciary relationship, withheld certain information from plaintiff. Such action is fraud.

We have searched the lawbooks for a case similar to the instant one. The case coming nearest to the instant facts in holding that failure to disclose information, when acting in confidential relationship, is fraud is the case of Bardach v. Chain Bakers, Inc., et al. 37 New York Supp. 2d, 584, affirmed without opinion, 50 N. E. 2d. 233.

Although the opinion is short and can be quickly read, we shall not set it out here, but will set forth the holding:

> "An escrow holder under a contract of purchase and sale of the retail portion of a bakery owed the buyer as a 'fiduciary' the highest kind of loyalty and was under a duty to disclose the situation as to the finan-

cial difficulties of the bakery and its officer which had come to the holder's notice.

"Where escrow holder under a contract to purchase a bakery failed to disclose his knowledge of the financial difficulties of the bakery and its officers and actively aided prosecution of the fraud against buyer by statements to buyer and in disposing of escrow moneys so as to prevent buyer's attention from being drawn to the situation, buyer was entitled to damages for 'fraud' from the escrow holder upon rescission of the contract."

The instant case is comparable to this. The bank had agreed to act as escrow holder; the escrow agreement and copy of it were adduced in evidence. The bank had knowledge of the financial difficulties of the Fourth of July Mining Company, but failed to disclose them to the plaintiff. The bank actively engaged in the fraud not only by withholding this information, but by preparing the mortgage contrary to the instructions of the plaintiff, and disbursing the $10,000 when it had not followed his directions.

While the court in the Bardach case, supra, directed judgment for the plaintiff, we do not go that strong, but we do urge that there was an issue of fact on fraud and damages to go to the jury, and that the court definitely erred in directing verdict for the defendants.

The evidence throughout showed that plaintiff relied upon the defendants and entrusted to them the performance of certain acts with respect to this mortgage. We believe this created a fiduciary relationship. To determine whether there

existed a "fiduciary relationship" between plaintiff and defendants, we turn to the definition of that term appearing in Restatement of Trusts and of the liability thereunder in Restatement of Torts.

In Restatement of Trusts, Sec. 2 (b) at page 7, it is said:

> "A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matter within the scope of the relation. . . . . If the fiduciary enters into a transaction with the other and fails to make a full disclosure of all circumstances known to him affecting the transaction, or if the transaction is unfair to the other, the transaction can be set aside by the other."

And at page 432, Section 874 of Restatement on Torts:

> "A person standing in fiduciary relationship with another is liable to the other for harm resulting from a breach of duty imposed by such relationship."

A collection of definitions of fiduciary or confidential relationships appears in Volume 16, Words & Phrases, page 513 through 522, among which are some of the following:

> "Those informal relations which exist whenever one man trusts and relies upon another.
>
> "Where a person has rights and duties which he is bound to exercise for the benefit of another, it can be said a fiduciary relationship exists; placing of confidence on one side, superiority and domination on the other, or influence."

We think these definitions apply to the instant matter wherein defendants were engaged to prepare a mortgage and act as escrow holder, and in the course thereof failed to disclose the information they had concerning the mortgage made by the Mining Company to the bank which mortgaged property not belonging to the company, and that if question had been submitted to the jury, there was sufficient evidence to estabilsh fraud by reason thereof, and sufficient evidence to have sustained a finding by the jury that the plaintiff had given the defendants instructions, and that defendant knew they could not perform such instructions, yet accepted the employment and violated or disregarded the instructions. Such findings of fraud would justify plaintiff's rescission of the contract and entitle him to the return of the $10,000 delivered to the bank, if plaintiff's theory as to damages is (and had been) followed.

We cannot emphasize too strongly that we believe the trial court erred in holding that plaintiff was first required to foreclose his mortgage. Such action would have been an affirmance of the actions of the bank. The bank was an escrow holder. Money had deposited with it to be disbursed escrow holder. Money had been deposited with it to be disbursed upon said conditions. The conditions had been violated. Under such circumstances, forclosure of the mortgage as ultimately prepared by the bank would have been a ratification by plaintiff of the acts of defendant, and he would be unable to maintain an action of restitution of his moneys after discovering the fraud of the bank.

We respectfully urge in closing that the trial court erred for all the foregoing reasons in directing verdict for the defendants in that there was ample evidence of fraud, that the trial court erroneously deprived plaintiff of the admission of evidence relating to value, and that even so, there was sufficient evidence of damages to justify the case going to the jury on plaintiff's theory of restitution of the $10,000 by reason of fraud.

Whether plaintiff gave such direction, whether defendant understood them, violated them, did not make full disclosure were all questions of fact for the jury and should not have been determined by the trial court.

CONCLUSION

In conclusion we respectfully submit that upon the record and law, that the judgment entered in the District Court should be reversed and a new trial granted, and that upon such new trial evidence be permitted to be adduced in accordance with the authorities of this brief, and that the trial court be directed that the evidence adduced in the instant matter is deemed sufficient to permit the cause to go to the jury. And appellants seek their costs on appeal.

Respectfully submitted,

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Attorney for Appellant.